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IN THE

Supreme Court of the United States.

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JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1905.

THE UNITED STATES,

Petitioner,

v.

GEORGE RIGGS & CO.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES CURIE,
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Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, Petitioner, vs. GEORGE RIGGS & CO., Respondents.	No.

BRIEF FOR RESPONDENTS.

Statements outside of the record.

I respectfully suggest that the practice of basing applications to this Court for writs of *certiorari* on statements of fact not based on anything in the record is one that is not to be commended, even when the moving party is so distinguished an officer as the Solicitor General of the United States.

I beg to call attention to the following paragraph in petitioner's brief:

> "The construction adopted by the Court below, if not repudiated, will also defeat, in large measure, the purpose of Congress to give special encouragement to domestic manufacturers of figured cottons, and may

> seriously cripple that industry, which, under the protection heretofore supposed to exist, I am informed has grown into very considerable importance, giving employment to many people and large capital. Domestic manufacturers estimate that a product of $50,000,000 will be affected by this adverse decision. I am further advised that the domestic use of expensive cottons has shown large increase in recent years, and that the growth will probably continue.

There is, of course, nothing on this subject in the record, and I respectfully submit that such statements should not be made part of applications of this character. If they were to be contradicted or denied by counsel for the respondents there would be no way of the Court determining which statements were correct; and if, on the other hand, such statements are to be treated as proper when coming from counsel for the Government and improper when made by counsel for the citizen, such a view does not seem consistent with evenhanded justice.

Laches.

The Court will find, by reference to the published report of the decision of the Court of Appeals in this case (136 Fed. Rep., 583), that the decision of that Court was handed down on the 3d day of March, 1905. The present application is noticed for the 18th of December, 1905. The interval is over nine months. This Court did not adjourn for the summer at the conclusion of its last term until the 29th day of May, and according to my calculation there were eleven Mondays after March 3d and before the adjournment of the Court at which petitions for writs of *certiorari* could have been submitted. There must have been almost as many since the opening of the present Term. The Customs Administrative Act of 1890 was passed to expedite the settlement of disputed questions of customs law. At the time of its enact-

ment the act creating the Circuit Court of Appeals had not been passed. The spirit and intent of the legislation is therefore indicated by Section 15 of the Customs Administrative Act, which limited the time of the Attorney General to appeal from a decision of the Circuit Court to thirty days, and which provided as to all courts passing on customs cases that they should give priority to such cases. How much of the $280,000 excessive duties collected, and how many of the 5,080 protests, referred to by the Solicitor General in his statement, are covered by the period of nine months since the Court of Appeals decided this question must be left to conjecture, as we do not feel justified in following what we must regard as a bad example, even when set by so eminent an authority as the learned Solicitor General.

It is true that in the case of *The Conquerer*, 166 U. S., at p. 110, this Court decided that:

> "It would seem that he (the party complaining) is, by analogy, entitled to the year within which, by Section 6, an appeal shall be taken or writ of error sued out from this Court, to review judgments or decrees of the Court of Appeals in cases where the losing party is entitled to such review."

But in that case the decree below had been entered immediately after this Court had adjourned for the term and the application was made during the next term. The Court said it thought such application should be made with reasonable promptness, and we submit that in this case it has not been made with reasonable promptness. While under the decision quoted the present application may not be denied because the time within which it might be made had expired, we think the delay in making it is a circumstance which the Court may properly take into consideration in determining whether merchants importing staple lines of merchandise shall find questions of customs law (as to which the decisions

of the Court of Appeals are as final as they are on any subject), reopened and litigation prolonged after more than nine months has expired since the Court of Appeals decided them.

Reasons assigned for the application.

Substantially the only reasons assigned for this application are, 1st, that the Government wants it; 2d, that the domestic manufacturers want it, and 3d that, the decision of the Court of Appeals is opposed to an assumed intent of Congress. We submit that none of these constitute sufficient reason for the application. If either of the first two be a sufficient reason then every customs case may come to this Court, as defeated litigants usually desire further appeals, and any construction favorable to the importer is apt to conflict with the desires and interests of domestic manufacturers.

As to the third reason assigned, we submit that the only question properly before this Court is whether the decision of the Court below is in accordance with the plain language of the statute. If it is, and it is contended that Congress meant to do something different from what it did, the remedy as very properly intimated by the Court of Appeals in its opinion, is in Congress and not in the Courts.

The argument based on so-called illustrative samples.

The learned Solicitor General says in his brief:

> "Illustrative exhibits were presented by the Government's Examiner of cotton goods to show that certain cotton cloth frequently imported would pay less duty than similar cloth of plain weave if the importer's contention prevailed. The exhibits represented actual importations such as he was frequently called on to pass."

In regard to this, we ask the Court to note in the record that when these samples were produced the Examiner was asked (p. 25, fol. 75) to state who imported the article, and declined to answer the question, in which refusal he was sustained by the Board of General Appraisers. We respectfully submit that under these circumstances the samples produced by him were entitled to no consideration in a judicial proceeding, as no opportunity was afforded the importer to investigate and determine whether the samples were actual and ordinary importations, or whether they were goods specially manufactured for use as samples. Little attention was given to these samples in the Court below, which said:

> "We are not concerned with the effect which this interpretation may have upon other merchandise not involved in the present controversy. As before stated, such considerations are not for the courts."

It is not contended by the Solicitor General that as to the goods involved in this case the duties claimed by the importer are less than 35 per cent., ad valorem. And not only are no other goods before the Court, but all statements as to other goods are pure assertions of matters outside of the record, or (as to the so-called illustrative samples) improperly in the record.

We respectfully submit that the Court is not concerned with what effect upon particular pieces of goods that have been or may be manufactured any given construction of the Tariff paragraphs may result in. As said by Judge Shipman in the case of Claflin *v.* U. S. (52 Fed. Rep., 121):

> "It is argued that it is unreasonable to suppose that Congress intended to impose a higher duty upon cotton handkerchiefs having a plain cheap hem than upon those which were prevented from raveling in a more ornamental and expensive manner. It is true that the construction makes apparent a lack of symmetry in the rates of duty, but the

> Court cannot attempt to adjust into symmetry the various provisions of a statute, &c."

The only question for consideration is what the language of the taxing law calls for. If that is to be abandoned, and every Tariff case is to be decided upon what the effect of any particular decision would be on illustrative samples, the courts will be completely at sea, and no merchant can know what the duty on any merchandise will be.

The proper construction of the statutes involved.

As to this point the subject is so admirably, lucidly and convincingly presented in two paragraphs of the able opinion of Judge Coxe in the Court below, that we content ourselves with reprinting those here as effectually answering every argument contained in the Government's brief. They are as follows:

> "Assume that the imported merchandise is figured cotton cloth, bleached, containing 125 threads to the square inch, and weighing five square yards to the pound, if the Collector has no other data regarding it he will inevitably levy a specific duty of three cents per square yard under paragraph 306. He cannot levy an *ad valorem* duty under the proviso until he knows what the value is, and he cannot know that unless the law permits him to know it. In short, paragraph 313 has given him all the criteria which he is to use in ascertaining the duty under paragraph 306, and they do not include the value of the goods. If this omission be a mistake, Congress can cure it, the Courts cannot
>
> It is said that the words of paragraph 313, 'other cotton cloth of the same description,' are broad enough to include value. We think this contention would be entitled to weight if the sentence had stopped with the words quoted, but it is manifest that Congress was not stating a broad, general comparison,

but was giving in minute detail the precise points of similarity which were to be taken into consideration. The omission of value from these is significant and cannot be ignored. If Congress had intended the construction urged by the appellant it would have required only the addition of the word 'value' after the word 'weight,' and we are unable to say that the omission may not have arisen from a desire to avoid the imposition of two duties upon the same article based upon the *ad valorem* standard."

The petition should be denied.

Dated New York, December 18, 1905.

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